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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 DAVID A. PERRIE,

7 Plaintiff,

8 v.

9 ONEWEST BANK, FSB, et al.,

10 Defendants.

CASE NO. C11-6063BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

11 This matter comes before the Court on Defendant MERSCORP Holdings Inc. f/k/a
12 MERSCORP, Inc.'s ("MERSCORP") motion to dismiss (Dkt. 7). The Court has
13 reviewed the brief filed in support of the motion and the remainder of the file and hereby
14 grants the motion for the reasons stated herein.
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16 **I. PROCEDURAL HISTORY**

17 On December 28, 2011, Plaintiff David Perrie ("Perrie") filed a complaint against
18 Defendants OneWest Bank, FSB; Mortgage Electronic Registration Systems, Inc.;
19 Regional Trustee Services Corporation's ("Regional"); MERSCORP; and numerous
20 unnamed Does and Roes. Dkt. 1.

21 On March 2, 2012, MERSCORP filed a motion to dismiss. Dkt. 13. Perrie did not
22 respond.

23 **II. FACTUAL BACKGROUND**

24 On February 8, 2008, Pierre executed a promissory note in the amount of \$208,000
25 payable to IndyMac Bank, FSB. Dkt. 7, Exh. 1. On February 19, 2008, Pierre executed a
26 Deed of Trust that encumbered real property commonly known as 19930 83rd Avenue
27 East, Spanaway, Washington ("Property"). *Id.*, Exh. 2. On May 26, 2011, Pierre was
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1 sent a Notice of Default. *Id.*, Exh. 3. On August 10, 2011, Regional recorded a Notice of
2 Trustee's Sale and set the sale for November 14, 2011. *Id.*, Exh. 5. The sale was initially
3 postponed, but finally occurred on January 13, 2012.

4 **III. DISCUSSION**

5 As a threshold matter, the Court may consider a failure to respond to a motion as
6 an admission that the motion has merit. Local Rule CR 7(b)(2). Perrie failed to respond
7 to the instant motion and the Court considers the failure an admission that the motion has
8 merit.

9 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
10 Procedure may be based on either the lack of a cognizable legal theory or the absence of
11 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d
12 696, 699 (9th Cir. 1990).

13 The sole method to contest and enjoin a foreclosure sale is to file an action to
14 enjoin or restrain the sale in accordance with RCW 61.24.130. *CHD, Inc. v. Boyles*,
15 138 Wn. App. 131, 137 (2007). An individual waives his right to challenge a foreclosure
16 when he "(1) receives notice of the right to enjoin the sale, (2) has actual or constructive
17 knowledge of a defense to foreclosure before the sale, and (3) fails to bring an action to
18 obtain a court order enjoining the sale." *Id.* (citing *Plein v. Lackey*, 149 Wn.2d 214, 227
19 (2003)).

20 In this case, Pierre waived his right to contest the foreclosure in this action. Perrie
21 receive notice of his right to enjoin the sale. *See* Dkt. 7, Exh. 5. Perrie had actual
22 knowledge of defenses to the foreclosure. *See* Dkt. 1 (the complaint). Perrie failed to
23 seek a court order enjoining the sale. *Id.*
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1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that MERSCORP's motion to dismiss (Dkt. 7)
3 is **GRANTED** and Perrie's claims against MERSCORP are **DISMISSED with**
4 **prejudice**. The Clerk is directed to close this case because all of Pierris's claims against
5 named defendants have been dismissed.

6 DATED this 5th day of April, 2012.

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9 BENJAMIN H. SETTLE
10 United States District Judge
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